

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

LAURIE MILLER, BRIAN DIMAS,
KIM MILLS, ANTHONY SOZA,
BRUCE CAMPBELL, KELLIE
BOWERS, TIM HUNTER, BRIAN
SAYLOR, MICHAEL SCHAMADAN,
INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE
OF HIS WIFE, BRANDI SCHAMADAN,

Plaintiffs,

vs.

YORK RISK SERVICES GROUP,

Defendant.

2:13-cv-1419 JWS

ORDER AND OPINION

[Re: PRELIMINARY ORDER]

I. NATURE OF THIS ORDER

In this order, the court sets out its preliminary views on the motion at docket 8. The purpose of the order is to assist the parties in preparing for oral argument on the motion. The court will set the time for the oral argument during the planning and scheduling conference which is to take place on December 11, 2013.

This order does **not** authorize the filing of any additional briefing. After hearing oral argument, the court may adopt this order in whole, or in part, or enter a different order addressing the motion at docket 8.

II. MOTION PRESENTED

At docket 8 defendant York Risk Services Group (“Defendant”) moves to dismiss the complaint filed by plaintiffs Laurie Miller, Brian Dimas, Kim Mills, Anthony Soza, Bruce Campbell, Kellie Bowers, Tim Hunter, Brian Saylor, and Michael Schamadan, individually and as representative of the estate of his wife, Brandi Schamadan, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for which relief can be granted. Plaintiffs respond at docket 10. Defendant replies at docket 11. Oral argument was requested and will be heard.

III. BACKGROUND

Plaintiffs are or were employed by the City of Phoenix (“City”) fire department as firefighters or engineers. Defendant is a third-party insurance administrator for the City and adjusts workers’ compensation claims made by City employees. Plaintiffs, including Michael Schamadan on behalf of his late wife, allege that they sustained serious injuries or illnesses resulting from their work and filed workers’ compensation claims. They allege that Defendant, with the assistance and knowledge of certain City employees, wrongfully denied and delayed workers’ compensation benefits and as a result their medical care and financial condition suffered.

Plaintiffs bring two claims against Defendant. First, they allege that Defendant, acting in concert with the City, fraudulently denied their workers’ compensation benefits in violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961, 1964, and 1965. Second, they allege that Defendant violated Arizona law by aiding and abetting the City’s breach of its duty of good faith and fair dealing.

Defendant moves to dismiss both claims. As to the RICO claim, it argues that Plaintiffs have not alleged and cannot allege that they were injured in business or property as is required under RICO,¹ because their injuries are personal injuries and are not business related. It argues that RICO was not intended to provide Plaintiffs with

¹18 U.S.C. § 1964(c).

another vehicle for bringing bad faith claims against insurance companies and that the Arizona Workers Compensation Act provides an exclusive remedy for employees injured during the scope of employment. As for the aiding and abetting claim, Defendant argues that Plaintiffs cannot bring such a claim against it, an agent of the City, as a matter of Arizona law. Alternatively, it argues that Plaintiffs failed to adequately plead an aiding and abetting claim.

IV. STANDARD OF REVIEW

Rule 12(b)(6) tests the legal sufficiency of a plaintiff's claims. In reviewing such a motion, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party."² To be assumed true, the allegations "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively."³ Dismissal for failure to state a claim can be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."⁴ "Conclusory allegations of law . . . are insufficient to defeat a motion to dismiss."⁵

To avoid dismissal, a plaintiff must plead facts sufficient to "state a claim to relief that is plausible on its face."⁶ "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."⁷ "The plausibility standard is not akin to

²*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

³*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

⁴*Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

⁵*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

⁶*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

⁷*Id.*

a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”⁸ “Where a complaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”⁹ “In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”¹⁰

V. DISCUSSION

A. RICO Claim

To recover under RICO a plaintiff must allege “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity . . . (5) causing injury to the plaintiff’s ‘business or property.’”¹¹ Defendant argues that Plaintiffs have failed to state a valid injury to “business or property” as required because their damages are “wholly derivative of their personal injuries.”¹²

In support of its argument, Defendant relies on *Jackson v. Sedgwick Claims Management Services, Inc.*,¹³ a recent en banc opinion by the Sixth Circuit. In *Jackson*, the plaintiffs were employees who suffered work-related injuries. They filed workers’ compensation claims with the employer’s third-party benefit claims administrator. The claims administrator disputed the employees’ claims and refused to pay them benefits.

⁸*Id.* (citing *Twombly*, 550 U.S. at 556).

⁹*Id.* (quoting *Twombly*, 550 U.S. at 557).

¹⁰*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); see also *Starr v. Baca*, 652 F.3d at 1216.

¹¹*Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996) (quoting 18 U.S.C. §§ 1964(c), 1962(c)).

¹²Doc. 8 at p. 5.

¹³731 F.3d 556 (6th Cir. 2013).

1 The *Jackson* plaintiffs sued, alleging that the employer, its claims administrator,
2 and a doctor used by the claims administrator engaged in a fraudulent scheme to deny
3 workers' compensation benefits to injured employees in violation of RICO. The district
4 court granted the defendants' motion to dismiss, and a Sixth Circuit panel reversed¹⁴
5 based on *Brown v. Cassens Transport Co.*,¹⁵ which held that employees' alleged injury
6 to property under RICO by alleging devaluation of either their statutory expectancy of or
7 claim for workers' compensation benefits.

8 The Sixth Circuit granted the defendants' petition to rehear the case en banc. It
9 then overruled *Brown*, holding that activity leading to a loss or devaluation of workers'
10 compensation benefits did not constitute the injury to business or property required to
11 support a RICO claim.¹⁶ The court concluded that the definition of the term "business or
12 property" under RICO "depends on federal statutory purpose," not necessarily state law,
13 and that "the task of [the] court is to 'determine whether Congress intended the
14 damages that plaintiffs seek . . . to be recoverable under civil RICO.'"¹⁷ The court
15 concluded that even if the expectation of workers' compensation benefits constituted a
16 property right under state law, injury related to those benefits is not sufficient to support
17 a RICO claim because such injury is "inextricably intertwined with a personal injury" and
18 "personal injuries and pecuniary losses flowing from those personal injuries fail to
19 confer relief under [RICO]."¹⁸ It said its conclusion was strengthened when considered
20 in light of federalism principles, noting that if Congress intended to allow plaintiffs to use
21 RICO "to collaterally attack an administrative scheme created by state law to supplant
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23 ¹⁴699 F.3d 466 (6th Cir. 2012).

24 ¹⁵675 F.3d 946 (6th Cir. 2012).

25 ¹⁶731 F.3d at 558-59.

26 ¹⁷*Id.* at 565 (quoting *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988)).

27 ¹⁸*Id.* at 565-66.

1 personal injury tort claims,” it would expect a clear statement of Congress’ intent to do
2 so.¹⁹

3 There is no Ninth Circuit case specifically addressing whether the expectation of
4 workers’ compensation benefits is property for the purpose of bringing a civil RICO
5 claim, but in the Ninth Circuit what constitutes property under RICO is typically
6 determined by looking to state law.²⁰ In *Diaz v. Gates*,²¹ the plaintiff alleged that police
7 officers had fabricated evidence, tampered with witnesses, and conspired to obtain a
8 false conviction against him. He alleged that as a result he “was rendered unable to
9 pursue gainful employment” while defending himself and during incarceration.²² The
10 court stated that a plaintiff needs to allege both a financial loss and an injury to a
11 property interest valid under state law in order to bring a RICO claim.²³ It concluded
12 that Diaz alleged two types of injuries: “(1) the personal injury of false imprisonment and
13 (2) the property injury of interference with current or prospective contractual relations.”²⁴
14 The first, it concluded, was not compensable under RICO. The second, however, was
15 a valid property interest under California state law and, because plaintiff had alleged
16 both an injury to a valid property interest and a financial loss, he had a proper RICO
17 claim.²⁵

18 Here, the court concludes that Plaintiffs possess a property right in their workers’
19 compensation benefits under Arizona law. Taking the allegations in the complaint as
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21 ¹⁹*Id.* at 567.

22 ²⁰*Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005).

23 ²¹420 F.3d 897.

24 ²²*Id.* at 897.

25 ²³*Id.* at 900.

26 ²⁴*Id.* at 902.

27 ²⁵*Id.* at 900-02.

1 true, Plaintiffs all suffered injuries while working for the City's fire department. Under
 2 Arizona's workers' compensation statute, when an employee is injured on the job and
 3 the injury was not self-inflicted, that employee "shall be entitled to receive and shall be
 4 paid such compensation for loss sustained on account of the injury . . . as [is] provided
 5 by this chapter."²⁶ The mandatory language of this statute is sufficient to create a
 6 property interest in the expectation of workers' compensation benefits.²⁷ Also, Plaintiffs
 7 have a property right in their workers' compensation benefits because Plaintiffs are
 8 third-party beneficiaries of the insurance contract between the City and Defendant,²⁸
 9 and under Arizona law, a contractual right is a property right.²⁹ Indeed, Defendant does
 10 not argue that workers' compensation benefits are not property interests under Arizona
 11 law.

12 Defendant instead focuses on the fact that *Diaz* did not mandate that the court
 13 use state law definitions of property when determining whether a plaintiff suffered the
 14 requisite injury under RICO and urges the court to consider whether under federal law
 15 workers' compensation interests should be considered property. Indeed, other courts
 16 have noted that federal law ultimately determines what is "business or property" under
 17 RICO and that a property interest recognized by state law may still not rise to the level
 18 of "business or property" if it contravenes "federal statutory purpose."³⁰ Defendant
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20 ²⁶Ariz. Rev. Stat. §23-1021.

21 ²⁷See *Shelby Sch. v. Ariz. State Bd. of Educ.*, 962 P.2d 230, 242 ("An expectation of
 22 entitlement sufficient to create a property interest 'depend[s] largely upon the extent to which
 23 the statute contains mandatory language that restricts the discretion of the [agency].'" (quoting
Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980))).

24 ²⁸See *Rowland v. Great States Ins. Co.*, 20 P.3d 1158, 1163 (Ariz. Ct. App. 2001) ("It is
 25 undisputed that [the employee] was a third-party beneficiary of the workers' compensation
 insurance contract between his employer and [the insurer].").

26 ²⁹*Van Loan v. Van Loan*, 569 P.2d 214, 2116 (Ariz. 1977) (en banc) ("[A] contractual
 27 right . . . is a form of property.").

28 ³⁰*Jackson*, 731 F.3d at 565; *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir.
 1998); *DeMauro v. DeMauro*, 115 F.3d 94, 96 (1st Cir. 1997).

1 argues that allowing workers' compensation benefits to be considered property
2 contravenes the purpose behind RICO because it originates from a personal injury,
3 which would not be compensable under RICO. However, the court concludes that such
4 an argument is precluded based on *Diaz*. In *Diaz*, a personal injury (false
5 imprisonment) led to a property injury (interference with contractual and business
6 relationships), but the court stressed that the two injuries should be treated as distinct
7 injuries and held that the property injury was compensable under RICO.³¹ Thus, the
8 court rejected the argument that an injury to property is not recoverable under RICO
9 simply because it originated from or relates to a personal injury.

10 Here, Plaintiffs do not allege that Defendant caused their underlying personal
11 injuries and are not seeking to recover damages for those personal injuries. Instead,
12 they allege that Defendant caused injury to a separate and distinct property right—the
13 right to receive benefits—which caused additional hardships and losses. In other
14 words, while the Plaintiffs' RICO claims may have originated from personal injuries in
15 that Plaintiffs suffered personal injuries which led them to file claims for workers'
16 compensation, the harm alleged here is to the intervening legal entitlement which
17 caused additional financial losses. Based on *Diaz*, this is sufficient to raise a RICO
18 claim.

19 Defendant also argues that allowing Plaintiffs to bring a RICO action based on
20 allegations of fraudulent denials of workers' compensation claims would undermine the
21 goal of Arizona's workers' compensation framework, which is to provide an exclusive
22 remedy for an employee injured on the job. It urges the court to conclude that RICO
23 claims involving workers' compensation must fail because Congress has not expressly
24 stated its intent to allow supplemental remedies to a state's workers' compensation
25 scheme. However, as noted by Plaintiffs, "[i]t is of no moment that Arizona provides an
26 alleged exclusive remedy for workplace injury" because, under the Supremacy Clause,
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28 ³¹*Diaz*, 420 F.3d at 901-02.

1 Arizona cannot make its workers' compensation scheme exclusive of federal
 2 remedies.³² Moreover, while the court recognizes the federalism concerns raised by
 3 Defendant and discussed in the Sixth Circuit's majority opinion *Jackson*, they do not
 4 find support under Ninth Circuit law which is binding on this court. It may be added that
 5 analysis by the dissent in *Jackson* is persuasive: "The predicate offense for the RICO
 6 action is mail fraud, not the denial of worker's compensation for a personal injury."³³ "A
 7 federal RICO claim and a state claim for worker's compensation are legally distinct,
 8 even though they share factual underpinnings."³⁴

9 **B. Aiding and Abetting Claim**

10 Defendant argues that Plaintiffs' claim that Defendant, acting as an agent of the
 11 City, aided and abetted the City's bad faith fails as a matter of law because a
 12 corporation can only act through its employees and agents and thus cannot aid and
 13 abet itself. This argument is unavailing. Under Arizona law, it is established that "an
 14 agent will not be excused from responsibility for tortious conduct because he is acting
 15 for his principal."³⁵ Indeed, applying this principle of agency law, other judges in this
 16 district have determined that an agent can be liable for aiding and abetting a principle's
 17 breach of the duty of good faith and fair dealing under Arizona law.³⁶ As noted in
 18 another recent District of Arizona case, *Inman v. Wesco Ins. Co.*,³⁷ "[i]t is true that there
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20 ³²Doc. 10 at p. 12.

21 ³³731 F.3d at 582 (Moore, J., dissenting).

22 ³⁴*Id.*

23 ³⁵*Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 127 (Ct. App. 2008).

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 25 ³⁶*Inman v. Wesco Ins. Co.*, No. cv-12-02518, 2013 WL 2635603, at *4 (D. Ariz. June 12,
 26 2013) (holding that an insurance adjuster could be held liable for aiding and abetting an
 27 insurer's violations of the duty of good faith and faith dealing); *Morrow v. Boston Mut. Life Ins.*
Co., No. CV-06-2635, 2007 WL 3287585 (D. Ariz. Nov. 5, 2007) (holding that an agent of an
 insurance company could be liable for aiding and abetting the company's insurance bad faith).

28 ³⁷No. CV-12-02518, 2013 WL 2635603 (D. Ariz. June 12, 2013).

1 are not many recorded cases where a claim is pressed against the adjuster;
 2 nevertheless, [the defendant] has not shown any reason why principles of agency law
 3 should not apply with equal force in the insurance setting.”³⁸

4 Defendant argues that these other district court cases were incorrectly decided
 5 and that this court should conclude that agents cannot, as a matter of Arizona law, aid
 6 and abet their principles. It argues that under Arizona law, agents cannot conspire with
 7 their corporate principal when acting on behalf of its principal, citing *Perry v. Apache*
 8 *Junction Elementary School District*³⁹ and *Petroni v. Board of Regents*⁴⁰ and because
 9 both civil conspiracy and aiding and abetting are derivative torts, the court should apply
 10 similar reasoning and conclude an agent cannot aid and abet its principal’s tortious
 11 conduct when it acts on behalf of the principal. However, as noted in Judge Bolton’s
 12 recent order in *Smith v. Country Mutual Insurance Co.* when rejecting a similar
 13 argument,⁴¹ the cause of action for aiding and abetting is not the same as conspiracy.
 14 “There is a difference between proving an agreement to participate in a tortious line of
 15 conduct (civil conspiracy) and proving knowing action that substantially aids tortious
 16 conduct (aiding and abetting).”⁴² Defendant does not cite any authority to convince the
 17 court that an agent cannot aid and abet his principal in the commission of a tort, even if
 18 that tort arises in an insurance setting.

19 Defendant alternatively argues that Plaintiffs’ aiding and abetting claim should be
 20 dismissed because they have not provided enough detail to sufficiently plead an
 21 underlying tort committed by the City. To properly plead a claim of aiding and abetting
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23 ³⁸*Id.* at *4.

24 ³⁹514 P.2d 514 (Ariz. Ct. App. 1973).

25 ⁴⁰566 P.2d 1038 (Ariz. Ct. App. 1977).

26 ⁴¹2:12-cv-02351-SRB (Jan. 10, 2013).

27 ⁴²*Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395*
 28 *Pension Trust Fund*, 38 P.3d 12, 28 n.16 (Ariz. 2002) (en banc).

1 tortious conduct, a plaintiff must allege that (1) the primary tortfeasor committed a tort
2 that causes injury to the plaintiff; (2) the defendant knew that the primary tortfeasor's
3 conduct constituted a breach of duty; and (3) the defendant substantially assisted or
4 encouraged the primary tortfeasor in the achievement of the breach.⁴³ Here, the
5 underlying tort allegedly committed by the primary tortfeasor, the City, is bad faith. To
6 allege a claim of bad faith, Plaintiffs must allege facts that "show the absence of a
7 reasonable basis for denying the claim." While Defendant correctly points out that
8 much of the complaint details actions allegedly taken by Defendant and does not
9 provide specific facts about the City's actions, the court concludes that read as a whole,
10 the complaint adequately pleads an aiding and abetting claim. It sets forth sufficient
11 facts about Defendant's alleged actions to show the absence of a reasonable basis for
12 denying the claim, and then it states that the City either participated in or approved of
13 Defendant's actions.⁴⁴ Taking all allegations as true and drawing all inferences in favor
14 of Plaintiffs, the complaint sufficiently pleads that the City committed the underlying tort
15 of bad faith which may then support an aiding and abetting claim against Defendant.

16 **C. Michael Schamadan's claims**

17 Defendant asks that the court dismiss Michael Schamadan's claims, in both his
18 individual capacity and as representative for Brandi Schamadan's estate, to the extent
19 he seeks damages for pain and suffering. As for Mr. Schamadan's individual claims,
20 the complaint only sets forth the damages suffered by Mrs. Schamadan.⁴⁵ It fails to
21 allege that Mr. Schamadan suffered an injury or any losses as a result of Defendant's
22 actions. Accordingly, Mr. Schamadan has not adequately pled his individual claim.

23 As for Mr. Schamadan's claims as representative of Mrs. Schamadan's estate,
24 his RICO claim survives for the reasons discussed above, and he may recover for the
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26 ⁴³*Id.* at 23.

27 ⁴⁴Doc. 1 at ¶ 70.

28 ⁴⁵Doc. 1 at ¶ 11.

1 financial losses arising from the injuries to Ms. Schamadan's property rights on behalf
2 of Mrs. Schamadan's estate. However, to the extent the complaint seeks to recover for
3 the pain and suffering of Mrs. Schamadan as a result of the Defendant's alleged RICO
4 violations, that portion of the complaint must be dismissed. Indeed, none of the
5 Plaintiffs may recover damages for "humiliation, worry, and distress" under RICO. Their
6 RICO remedies are limited to financial loss. To the extent the complaint seeks recovery
7 for Mrs. Schamadan's pain and suffering as a result of Defendant's alleged aiding and
8 abetting that portion of the complaint is dismissed, because under Arizona law claims to
9 recover damages for pain and suffering do not survive the death of the person injured.

10 **VI. PRELIMINARY CONCLUSION**

11 Based on the above, Defendant's motion at docket 8 to dismiss Plaintiffs'
12 complaint pursuant to Rule 12(b)(6) probably should be denied in part and granted in
13 part as follows: Defendant's request that Plaintiffs' RICO claims be dismissed probably
14 should be denied; Defendant's request that Plaintiffs' aiding and abetting claims be
15 dismissed probably should be denied; Defendant's request that Mr. Schamadan's
16 claims as representative of the estate of Mrs. Schamadan be dismissed to the extent
17 they seek damages for pain and suffering clearly should be granted; Defendant's
18 request that Mr. Schamadan's individual claims be dismissed probably should be
19 granted, but Mr. Schamadan's request to be permitted to seek leave to amend his
20 individual claims probably should be granted.

21 DATED this 9th day of December 2013.

22
23 /S/
24 JOHN W. SEDWICK
25 UNITED STATES DISTRICT JUDGE
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